89-345

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARIA KAMECKI, ESTATE,
and
JULIANNA KAMECKI,
Plaintiffs/Appellants,

v.

NICOLA A. SMILEVSKY, M.D., P.C.,
Defendant/Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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QUESTIONS PRESENTED

I. At what point during the development of a medical malpractice case is a court permitted to grant summary judgment?

a) What do the words "adequate time for discovery" mean?

b) Is summary judgment appropriate when the nonmoving plaintiff party has not yet deposed defendant and defendant's witnesses?

II. What proof must a nonmoving party present to withstand a motion for summary judgment?

a) Does a plaintiff responding to a motion for summary judgment have a burden of proof identical to that of a plaintiff at trial?

b) Can a medical malpractice plaintiff avoid summary judgment by presenting an expert able to identify standard of care leaving proof of violation of the standard to nonexpert witnesses and discovery from defendant and defendant experts?

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No.

MARIA KAMECKI, ESTATE,
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JULIANNA KAMECKI,
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v.

NICOLA A. SMILEVSKY, M.D., P.C.,
Defendant/Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner seeks a writ of certiorari to review the judgment of the District of Columbia Court of Appeals entered in this case on May 31, 1989.

OPINION BELOW

The opinion of the Court of Appeals (App. A, 1a—3a) was issued as an unpublished Memorandum Opinion and Judgment. The decisions of the Superior Court of the District of Columbia, Civil Division, were issued as Orders. (App. B, C, 4a—7a)

JURISDICTION

The opinion of the court of appeals (App. A, *infra*, 1a) was entered on May 31, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. sections 1254 and 1257.

RULES OF CIVIL PROCEDURE INVOLVED IN THE CASE

This case involves District of Columbia Superior Court Rules of Procedure 26(b)(4) and 56. (See App. H, I, 17a—21a)

STATEMENT

This case is a medical malpractice complaint in which summary judgment was granted before Plaintiff had an opportunity to depose Defendant's expert witnesses.

On April 27, 1985, Ms. Julianna Kamecki, for herself and her mother Maria's estate, alleged, in the District of Columbia Superior Court, that Dr. Nicola A. Smilevsky had failed to provide proper medical treatment to her mother by misprescribing anti-stroke medication and withholding hospitalization causing permanent harm culminating in death.[1] Doctor Smilevsky denied the allegations, saying his treatment was in accordance with the accepted standard of care.

On January 9, 1987 the court, after a series of motions by Defendant, ordered parties to file Rule 26(b)(4) statements naming experts and their testimony. On April 27, 1987 Plaintiff named Dr. Maureen Minor, her mother's previous treating physician, proffering her testimony that it was standard prac-

[1]Complaint for Damages Arising from Medical Malpractice (C.A. 3017-85). See Appendix G For relevant paragraphs of the complaint. Ms. Kamecki filed and proceeded *pro se*, until June 9, 1986, when she obtained representation.

tice to provide anti-stroke medication to a stroke prone person like Maria Kamecki.[2]

Defendant deposed Dr. Minor on June 30, 1987, who said she had no opinion about Dr. Smilevsky's treatment since she had not reviewed it. On August 6, 1987, eleven days before his 26(b)(4) statement naming his expert witness(es) was due Defendant moved for summary judgment.

On September 21, 1987, the court granted Defendant's Motion for Summary Judgment. Plaintiff appealed to the District of Columbia Court of Appeals which affirmed the decision on May 31, 1989. It is this court of appeals decision that Petitioner asks this Court to review.

REASONS FOR GRANTING THE WRIT

1. There is confusion among the courts about summary judgment.

In June of 1986 this Court upheld summary judgment decisions in three important cases. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986). Since that time there has been a lack of clarity, if not confusion, about the Court's intentions.

As Eastern California District Chief Judge Karlton stated: "Although the Court repeatedly denied that it was altering those (summary judgment) standards, I know of no district judge who does not believe that in some fashion his or her duty in reviewing such motions has been altered." *Bhan v. Nme Hospitals, Inc.*, 669 F. Supp. 998, 1004 (E.D. Cal. 1987).

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[2]See Appendix D for Plaintiffs 26(b)(4) statement.

The federal court's summary judgment activity since June 1986 suggests confusion. Courts have cited the two leading summary judgment cases prior to 1986[3] (decided in 1968 and 1971) an average of 62 times annually. Since 1986 federal courts have cited *Celotex* and *Liberty Lobby* an average of 738 times a year each. See Appendix J for comparison.

There is controversy among district courts and a substantial number of circuit court dissents. Because the controversy is in the application of standards rather than in contrasting holdings, the conflict is most apparent in the words of judges dissenting as they apply *Celotex* and *Liberty Lobby* to the same facts.

Lower court judges have had varied responses to the impact of *Celotex* and *Liberty Lobby* upon the threshold for granting summary judgment. Many judges have commented that this line of cases has raised the threshold showing required by a nonmoving party in order to defeat summary judgment.[4] Other judges do not believe that such a change was intended by those cases.[5]

Perhaps the greatest difference among courts after *Celotex* and *Liberty Lobby* involves weighing evidence in deciding sum-

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[3]*Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1970) and *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S. Ct. 1575 (1968).

[4]*Greenberg v. Food and Drug Admin.*, 803 F.2d 1213, 1220 (D.C. Cir. 1986) (Bork, J., dissenting); *see also United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 280 (W.D. Mich. 1988); *J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 617 (3d Cir. 1987) (Becker, J., concurring); *Bhan*, 669 F.2d at 1004.

[5]*See Isquith v. Middle South Util. Inc.*, 847 F.2d 186, 198-99 (5th Cir. 1988); *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1013 (11th Cir. 1987); *In Re Leedy Mortgage Co. of North America v. U.S. Fidelity & Guar.*, 698 F. Supp. 183, 185 (W.D. Mo. 1983); *see also Greenberg*, 803 F.2d at 1216. The holding of the D.C. Circuit that summary judgment is not a drastic remedy is inconsistent with the holding of the District of Columbia Court of Appeals in this case.

mary judgments.[6] Some judges see the guidance to "view the evidence presented through the prism of the substantive evidentiary burden"[7] as tightening but not fundamentally altering the traditional "genuine issue of material fact" standard.[8] Other judges see it as fundamentally altering the standard, creating a "paper trial"[9] in which the motion will be granted if the evidence convinces the judge that the moving party's case is so "one-sided" he will win at trial. This has resulted in a number of dissenting opinions.[10]

The experience suggested by a review of the cases appears to bear out the prediction of the dissent in *Liberty Lobby* with regard not only to libel but to all types of cases:

> The primary effect of the Court's opinion today will likely be to cause decisions of trial judges on summary judgment motions in libel cases to be more erratic and inconsistent than before. This is largely

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[6]An increasing number of cases with cross summary judgment motions suggest one effect of broadening judges opportunities to weigh evidence in summary judgment motions.

[7]477 U.S. at 254, 106 S. Ct. at 2513.

[8]*See United Steelworkers v. Phelps Dodge*, 865 F.2d 1539, 1541-43 (9th Cir. 1989); *Izquith v. Middle South Util. Inc.*, 847 F.2d 186, 198-99 (5th Cir. 1988); *Offshore Aviation v. Transcon Lines, Inc.*, 831 F.2d 1012, 1015 (11th Cir. 1987); *Gonzalez v. Public Health Trust*, 686 F. Supp. 898, 900 (S.C. Fla. 1988); *Pearce v. E.F. Hutton Group, Inc.*, 664 F. Supp. 1490, 1512-13 (D.D.C. 1987).

[9]477 U.S. at 267, 106 S. Ct. at 2519 (Brennan, J., dissenting).

[10]*See EEOC v. Massachusetts*, 864 F.2d 933, 939 (1st Cir. 1988) (Coffin, J., dissenting); *Levendos v. Stern Entertainment, Inc.*, 860 F.2d 1227, 1233 (3d Cir. 1988) (Shapiro, J., dissenting); *Kurtz v. Vickery*, 855 F.2d 723, 734 (11th Cir. 1988) (Fay, J., dissenting); *Fosberg v. Pacific Northwest Bell Tel. Co.*, 840 F.2d 15409, 1422 (9th Cir. 1988) (Pregerson, J., dissenting); *Tunis Bros. Co. v. Ford Motor Co.*, 823 F.2d 49 (3rd Cir. 1987); *Moffatt Enterprises, Inc., v. Borden, Inc.*, 807 F.2d 1169, 1177 (3rd Cir. 1986) (Hunter, J., dissenting); *Lois Sportswear, U.S.A., Inc. v. Levis Straus & Co.*, 799 F. 2d 867, 877 (2d Cir. 1986) (Miner, J., dissenting).

> because the Court has created a standard that is different from the standard traditionally applied in summary judgment motions without even hinting as to how its new standard will be applied to particular cases. 477 U.S. at 272-73, 106 S. Ct. at 2523 (Rhenquist, dissenting).

2. This case presents a unique opportunity to clarify summary judgment.

Most if not all of the confusion about summary judgment revolves around the relationship between the two primary questions raised in this case. First, the question of timing. At what point during the development of a case is a court permitted to grant summary judgment? Second, the question of proof. How much proof must a nonmoving party present to withstand a motion for summary judgment?

The question of timing rests upon the meaning this Court gives the words "adequate time for discovery." The answer to this question in turn depends on the amount of proof required to defeat a motion for summary judgment. The more the proof needed to defeat summary judgment resembles proof needed to prevail at trial, the more the nonmoving party needs adequate time for adequate discovery.

The Court could significantly enhance the reliability and efficiency of summary judgment motions by clarifying how much and what kind of proof is required for a nonmoving party to defeat summary judgment and based on this finding specifying what "adequate time for discovery" means.

Three aspects of this case make it particularly useful for clarifying practical difficulties. First, Defendant moved for summary judgment eleven days prior to identifying his expert witness(es). Thus the Defendant asked the court, and it

agreed, to terminate the case prior to Plaintiff nonmoving party's opportunity to examine Defendant's witnesses and prior to deposition of Defendant.

Second, the court took this drastic action even though Plaintiff had proffered expert evidence that treatment with anti-stroke drugs was standard for patients such as Plaintiff and failure could cause injury. The court ruled that the expert must also testify that the doctor violated the standard for the case to proceed to examination of Defendant's experts.

Third, the trial court said: "My recollection is that Mr. Boone [attorney for Defendant moving party] has an article about taking the deceased off of persantine [coumadine], the particular medicine here, that would not produce stroke." Thus the court added weighing of substantive evidence (which had not been subject to authentication, cross examination or rebuttal) to the process of deciding summary judgment. The court cited *Celotex* and *Liberty Lobby*.

Each of these three aspects of the case sharpens the nature of practical difficulties with regard to timing and proof which have appeared since the Court decided *Celotex* and *Liberty Lobby*.

a. Timing. The practical effect of allowing summary judgment to cut off a case prior to the designation of the moving party's expert witnesses is to significantly alter the *substantive* nature of malpractice law. Prior to this ruling, the law of the District of Columbia allowed Plaintiffs to rely on the expert testimony of defense witnesses to establish their case:

> The primary purpose of the expert testimony requirement is not to screen unjust claims, but rather to aid the jury in reaching a just decision on complex, technical issues. Allowing plaintiffs in the appropriate case to prove a malpractice claim through

> the expert testimony of defendant physician or defense witnesses is not only consistent with the purposes of the expert testimony requirement and the adverse witness rule, but ensures, as far as possible, that a patient's just claim will not fall for want of available independent medical testimony. *Abbey v. Jackson*, 483 A.2d 330, 334 (D.C.App. 1984).

After this case plaintiffs no longer will be permitted to rely on Defendant's experts to prove their case. Absent persuasive evidence on all elements prior to designation of defense experts, plaintiff's case falls before a motion for summary judgment. This Court should answer whether it upholds this outcome. It could answer by limiting summary judgment to the time following completion of discovery, or at least until after the nonmoving party has been able to conduct its discovery.

b. Proof. By granting summary judgment in this case the trial court also altered the nature of the law of evidence. It required Plaintiffs expert witness to give fact as well as expert testimony. It transformed the deposition from a fact finding to fact hiding activity. It relied on facts not in evidence. It justified these action by reference to *Celotex* and *Liberty Lobby*.[11]

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[11]During oral argument before the court of appeals defendant's attorney stated: "And I'm going to confess something to the Court right now that maybe I shouldn't confess. I did not really believe that when I filed that motion for Summary Judgment that I was ultimately going to prevail on it. I filed it because, although the books don't talk about it this way, a Motion for Summary Judgment happens to be an excellent discovery device. If you cannot find out how your client, your opponent, plans on getting to the jury any other way, you can find out by filing a Motion for Summary Judgment because once you do that, he has got to come forward with something that will satisfy the judge in the court below that he's at least got a shot at making a case."

1) Expert. The Advisory Committee Note on Federal Rule of Evidence 702 states:

> Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case leaving the trier of fact to apply them to the facts.

The ruling in this case requires that the expert not only give information on the standard requirements of treating stroke patients with drugs, but also that an expert review the records to ascertain whether or not such treatment took place. The evidence taken in deposition from Plaintiff that Defendant had withdrawn all medication was considered inadequate to defeat summary judgement.

2) Deposition. Defendant deposed Plaintiff's expert but asked no questions about the evidence proffered in the 26(b)(4) statement. Rather he asked if she had an opinion about the treatment given deceased by Defendant. Since she had none— not having been asked to review records or form such an opinion— she answered no. On the basis of this answer the trial court granted summary judgment.

By this act the roles of the parties in the deposition are reversed. The deposing party no longer has an incentive to seek all the information available and the party proffering the witness must insure that all evidence the witness has on each element of the case is volunteered.

3) Facts. The trial court treated as a dispositive fact the assertion of defense counsel that an article which he showed the judge in chambers during a status conference showed that withdrawing persantine, one of the drugs at issue in the case, could not cause stroke.

In making these alterations of the role of proof in a summary judgment case, the trial court cited *Celotex* and *Liberty Lobby*. Whether the Court decides the timing question or not it could improve the usefulness of the summary judgment motion by clarifying the level of evidence required to defeat a motion for summary judgment.

The Court can do this by finding that a medical malpractice plaintiff *can* withstand a summary judgment motion by presenting an expert able to identify a standard of care while leaving proof of violation of the standard to non-expert witnesses and discovery from Defendant and Defendant's experts. This would establish that a Plaintiff responding to a motion for summary judgement does *not* have a burden identical to that of a Plaintiff at trial.

3. Comments by this court and others offer reason to clarify the standards of timing and proof in summary judgment proceedings.

In this case Plaintiff supported her allegations of improper medical treatment with testimony during deposition, answers to interrogatories, and production of all medical records. She said that Defendant, in treating her now deceased mother, removed the medicine prescribed by the previous physician, failed to order hospitalization after each of two stroke episodes, and did not examine the patient or prescribe anti-stroke medicine until after the second episode.

Defendant denied these allegations. In a trial status conference his attorney presented an article he said showed that the use of persantine was controversial (the article cited by the judge in granting summary judgment).[12] Defendant never

[12] During appeals court argument Mr. Boone referred to this article saying ". . . my *New England Journal of Medicine* article, which by the way Judge Wolf never saw, hasn't seen to this day, [supports] our conten-

countered plaintiff's proffered evidence that failure to follow standard practice of prescribing anti-stroke medicine puts a patient such as the deceased into increased risk. (*See* App. E, F, 10a—13a).

This is the type of situation addressed explicitly by the Court in *Celotex* when it said:

> Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred. 106 S. Ct. at 2553-4.

In this case summary judgment was granted before Plaintiff began discovery, but after she had filed a statement of material facts in dispute (the nature of the standard of care, the behavior of Defendant in meeting the standard, and whether experts would need to review Defendant's behavior to know if he met the standard).

Plaintiff's deposition testimony, answers to interrogatories and document submission, all controverted Defendant's assertions. The Court could clarify summary judgment by indicating

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tion. . ." Plaintiff contends that other articles oppose Defendant's contention including the possibility that *removing* a patient from persantine increases the chance of stroke. This is a controversy precluding summary judgment.

why, with this state of the record, hearing a summary judgment motion, let alone granting it, is not premature.[13]

A concurring opinion in the Third Circuit, in a case overturning summary judgment, divided the summary judgment question into two parts in order to facilitate "analysis of the timing question." Part one asked "Should a motion for summary judgment be entertained now" and part two asked " ... if so should summary judgment be granted." The opinion set out the following context for this bifurcation of the issue:

> ... I think that whether a motion for summary judgment may be considered at a particular stage of a lawsuit's progress is an important question... ... When read together, the Supreme Court's recent opinions in *Anderson v. Liberty Lobby* and *Celotex Corp. v. Catrett* instruct us that a motion for summary judgment must be granted unless the party op-

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[13]There is controversy betweern circuits on Rule 56(f). The 5th Circuit says opposition to summary judgment is adequate to seek further discovery. ***Murrell v. Bennett***, 615 F.2d 306 (5th Cir. 1980); ***Littlejohn v. Shell Oil CO.***,483 F.2d 1140, 1146 (5th Cir. 1973); ***cert. denied***, 414 U.S. 116, 94 S. Ct. 849 (1974), ***But see EEOC v. Massachusetts***, 864 F.2d 933 (1st Cir. 1988) (Coffin, J., dissenting); ***Dowling v. City of Philadelphia***, 855 F.2d 136 (3d Cir. 1988); ***Mid-South Grizzlies v. National Football League***, 720 F.2d 772 (3d Cir. 1983); ***Gray v. Udevitz***, 656 F.2d 588 (10th Cir. 1981); ***Over the Road Drivers v. Transport Ins. Co.***, 637 F.2d 991 (9th Cir. 1980); ***Thi-Hawaii v. First Am. Fin. Corp.***, 627 F.2d 991 (9th Cir. 1980); ***British Airways Board v. Boeing Co.***, 585 F.2d 946 (9th Cir. 1978), ***Cert. denied***, 440 U.S. 981, 99 S. Ct. 1790 (1979).

Other circuits say a special motion or affidavit must be filed. Since, in this case, Plaintiff had not yet begun discovery, had filed a statement of material facts in controversy and had disputed the factual claims of the Defendant, this does not appear to be a case calling for a 56(f) motion or affidavit. Nonetheless the issue of when it is necesary to file a 56(f) motion or affidavit is an additional point of conflict which the Court could clarify.

posing the motion can adduce evidence which, when considered in light of that party's burden of proof at trial, could be a basis for a jury finding in that party's favor. This is at least a break in tone with prior law, under which summary judgment was understood to be a "drastic remedy"...

Under *Celotex* and *Anderson*, therefore, the plaintiff can be put to his proof whenever the defendant chooses. If the motion for summary judgment is considered on the merits, plaintiff will be out of court if he has not adduced sufficient evidence to get to a jury on every element of his case.

This makes the timing of summary judgment motions a very important matter for it is quite likely that, when a complaint is first filed—or amended to set out a new theory of liability—a plaintiff will indeed lack enough evidence to get to a jury on every element. But we would not want to end the case because the plaintiff has not adduced sufficient evidence. We would instead want to permit the plaintiff to go forward with the discovery he believes necessary, and only put him to his proofs after he has had the opportunity to develop them.

Rule 56(f), Fed. R. Civ. P., governs when a motion for summary judgment may be considered on the merits. We have held that under that provision a trial judge may abuse his discretion if he decides a summary judgment motion when the party opposing it needs and is entitled to additional discovery which might demonstrate the existence of questions of material fact. *See Mid-South Grizzlies v. National Football League*, 720 F.2d 772 (3d Cir. 1983). Under the regime of *Celotex* and *Anderson*, the *Mid-South*

> *Grizzlies* timing requirement becomes important. *J.E. Mamiye,* 813 F.2d at 617 (3d Cir. 1987)(Becker, J., concurring).

The same Circuit upheld summary judgment in the *Mid-South Grizzlies* case saying:

> Considering the already large record compiled prior to its consideration of the summary judgment record, the absence of a Rule 56(f) affidavit, the irrelevance of most of the pending discovery requests, and the conjectural nature of the Grizzlies' contentions as to the possibility of establishment of actual or potential competition in any arguable relevant market, we conclude that the court did not err in considering the motion for summary judgment on the present record. *Mid-South Grizzlies, 720 F.2d at 781.*[14]

There are other important court comments on the timing and proof questions. In 1987 the Federal District Court for the Southern District of Illinois stated:

> Defendants first motion was made before discovery was completed...This Court has commented elsewhere on the mistaken view that Rule 56's authorization to file for summary judgment "at any time" is an open invitation to do so prematurely, comfortable in the assurance that if movant loses out he or she may simply run away, living again to fight another day. (see e.g., *Teamsters Local 282 Pen-*

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[14]*See also* note 6. In the present case petitioner argues that she met the requirements of summary judgment on the basis of material facts at issue, that defendant had already been ordered to name expert witnesses, and that plaintiff's discovery had not yet begun, distinguishing it sharply from *Mid-South Grizzlies.*

> *sion Fund v. Angelos*, 649 F. Supp. 1242, 1252-53 (N.D. Ill. 1986)). *Rateree v. Rockett*, 670 F. Supp. 787 (N.D. Ill. 1987).

The District Court for the Eastern District of Michigan said:

> *Celotex v. Catreet* does not mandate summary judgment [when defendants have not deposed witness who plaintiff says can link a product to an injury]... In *Celotex*, the Supreme court ruled that defendants were entitled to summary judgment because plaintiff identified no witness able to link product to injury. Here, plaintiff has identified a witness; the parties simply dispute the probable content of his testimony. Such a dispute raises a genuine fact issue for trial. . ." *Ditkof v. Owens- Illinois, Inc.*, 114 F.R.D. 104, 106 (E.D. Mich. 1987).

This case also cited a concurring opinion in *Celotex* saying:

> ...[I]f [Plaintiff] has named a witness to support her claim, summary judgment should not be granted without [Defendant] somehow showing that the named witness' possible testimony raises no genuine issue of material fact. Citing *Celotex* 106 S. Ct. at 555-556 (White J., concurring). Ditkof, 114 F.R.D. at 106.

Petitioner, in her case, proffered an expert witness to establish a standard of practice in stroke cases. Defendant ignored the proffered evidence and asked plaintiff's expert if she had an opinion on the way in which Defendant had treated Plaintiff's mother. The court treated her negative answer as dispositive of a summary judgment motion. It would have been more appropriate to treat the proffered evidence as true for purposes of summary judgment.

The rich commentary among the courts on the use of summary judgment beginning with this Court's opinions in *Celotex* and *Liberty Lobby* provides the Court a valuable resource for addressing petitioner's case. The case itself presents the timing and proof issues starkly. The trial judge, citing untested evidence, cut off the medical malpractice case before Plaintiff's discovery began after proffered expert evidence on standard of care. In seemingly similar situations lower courts appear to have denied summary judgment. Petitioner asks this Court to do the same.

CONCLUSION

Motions for summary judgment have become routine in current trial practice. *Celotex* and *Liberty Lobby* have each been cited by federal district and appeals courts more than 2100 times over the past three years. Whether the savings from cases cut off before trial outweighs the increased cost of litigating summary judgment is unclear. Either way this Court can improve both judicial economy and fairness by deciding this case.

Currently there is a tendency to use summary judgment motions as supplements to discovery or as no-risk attacks which when lost can be renewed. Whether or not these are proper uses, the broad timing ("at any time") and proof ("through the prism of the substantive evidentiary burden") standards provoke numerous appeals—generally an advantage for the party with more resources.

This case gives the Court the opportunity to address the timing and proof issues whether affirming or overturning summary judgment. Petitioner believes granting summary judgment before the nonmoving party begins discovery when the

balance of proof is as in this case is improper. This Court can make this clear by granting this petition and overturning summary judgment in this case.

Respectfully submitted,

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APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 87-1238

IN RE ESTATE OF MARIA KAMECKI,
JULIANNA KAMECKI,

v.

NICOLA A. SMILEVSKY,

Appeal from the Superior Court
of the District of Columbia
Civil Division

(Hon. Peter H. Wolf, Trial Judge)

(Argued May 18, 1989 Decided May 31, 1989)

Before FERREN and BELSON, Associate Judges, and GALLAGHER, Senior Judge.

MEMORANDUM OPINION AND JUDGMENT

Julianna Kamecki initiated this action in April 1985, alleging that a doctor had caused her mother to suffer strokes and eventually death by removing her from the stroke prevention medicine prescribed by the doctor who had previously treated her. She now appeals from the trial court's order granting summary judgment to the doctor.

At a status hearing held on January 9, 1987, the court directed appellant to file by April 6, 1987, a Super. Ct. Civ. R. 26 statement identifying the expert witnesses she expected

to present at trial. Appellee was to file his statement on August 17. On April 3, appellant sought and the court granted an extension of the time to April 27 to file the statement. On April 27, appellant filed a Rule 26 statement designating Maureen Minor, M.D., as her only medical expert.1 Dr. Minor had treated Marie Kamecki before she had become a patient of appellee.

Counsel for appellee deposed Dr. Minor on June 30, 1987. Neither appellant nor her counsel attended the deposition, assertedly because of an unexpected delay in counsel's return from out of town. At the deposition, Dr. Minor stated that she had not been contacted by appellant or her counsel and did not want to testify as an expert witness. She stated that she did not know whether appellee had deviated from the relevant standard of care.

The doctor filed a motion for summary judgment on August 6, 1987, on the ground that, without an expert to do so, appellant could not prove the relevant standard of care. The court granted the motion. Appellant moved for reconsideration of the order and argument was held, after which the court reaffirmed its order granting summary judgment in favor of the doctor. The court ruled that this was a case where expert testimony was unques- tionably necessary to prove a violation of the standard of care and causation; and that, since appellant had not obtained an expert to do this, summary judgment was appropriate. We agree. *See Eibel v. Kogan*, 494 A.2d 640 (D.C. 1985)

[1]The parties have brought to the attention of the court that Dr. Minor is now deceased.

Accordingly, it is

ORDERED and **ADJUDGED** that the judgment on appeal herein be, and the same is hereby, affirmed.

FOR THE COURT
/s/
Richard B. Hoffman
Clerk

Copies to:

Hon. Peter H. Wolf
Clerk, Superior Court

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APPENDIX B

THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MARIA KAMECKI, Estate	)	
and	)	
JULIANNA KAMECKI,	)	
Plaintiffs,	)	Civil Action No. 3017-85 Civil I - Judge Wolf
v.	)	
NICOLA A. SMILEVSKY, M.D.	)	
Defendant.	)	

ORDER

UPON CONSIDERATION of the unopposed Motion of defendant, Nicola A. Smilevsky, M.D., for Summary Judgment, the Memorandum of Points and Authorities in Support thereof, and the entire record herein and it appearing that there are no disputed issues of material fact and that said defendant is entitled to judgment as a matter of law, now, therefore, it is, by this Court, this 24th day of August, 1987,

ORDERED, that said Motion be, and the same hereby is, **GRANTED**; and it is further

ORDERED, that final judgment be and hereby is, entered in favor of the defendant, and it is further

ORDERED, that this action be, and hereby is, dismissed, with costs awarded by defendant.

/s/ _____
Judge Peter H. Wolf

Copies to:

Richard W. Boone, Esquire
James S. Turner, Esquire

APPENDIX C

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

Civil Division

MARIA KAMECKI, Estate and JULIANNA KAMECKI	)	
Plaintiffs	)	C.A. No. 3017-85
	)	Civil I - Judge Wolf
V.	)	
NICOLA A. SMILEVSKY, M.D.	)	
Defendants	)	

ORDER

On September 21, 1987 the court heard oral argument on Plaintiffs' Motion for Reconsideration of this court's order granting summary judgment signed August 24, 1987. The court considered plaintiffs' aforesaid motion, the points and authorities in support thereof, plaintiffs' late-filed opposition to defendant's Motion for Summary Judgment and the memorandum of points and authorities in support thereof, and defendant's opposition to Plaintiff's Motion for Reconsideration.

For the reasons stated on the record in open court on September 21, 1987, it is this 22nd day of September of 1987

ORDERED, that Plaintiffs' Motion for Reconsideration is **GRANTED**, and it is further

ORDERED, that this court's prior order, signed August 24, 1987 granting summary judgment in favor of defendant and dismissing this case with costs, is **REAFFIRMED.**

/s/ _____
PETER H. WOLF
Judge

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APPENDIX D

THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA CIVIL DIVISION

MARIA KAMECKI, Estate and JULIANNA KAMECKI, Plaintiffs, v. NICOLA A. SMILEVSKY, M.D., P.C. Defendant.	Civil Action No. 3017-85

PLAINTIFF'S RULE 26(b)(4)

Plaintiff, pursuant to Rule 26(b)(4) of this Court, states as follows:

1. Plaintiff plans to call Maureen N. Minor, M.D., 403 East Capitol Street, Washington, D.C. 20003 as an expert witness in this case.

2. Dr. Minor is expected to testify to the following matters:

a. That Maria Kamecki, deceased plaintiff in this case, was prescribed the prescription drug persantine as a treatment to help prevent occurrence of a stroke;

b. That such prescription indicates that the person receiving it is believed by a physician to be in danger of having a stroke;

c. That it is standard medical practice for a person having a stroke potential to receive a prescription for anti- stroke medication;

d. That a person who should receive anti-stroke medication and fails to receive it is put into increased danger of having a stroke;

e. That according to standard medical practice a person believed to be prone to a stroke, who has an incident which can be construed as a stroke, should be put on anti-stroke medication to prevent a recurrence according to standard medical practice.

3. Dr. Minor's testimony as to these matters will be based on her medical education, clinical experience, familiarity with the standard of care in the treatment of these conditions and current research as reported in scientific and medical literature.

Respectfully submitted,

/s/ _____
James S. Turner #082479

/s/ _____
Betsy E. Lehrfeld #379359

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APPENDIX E

THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA CIVIL DIVISION

MARIA KAMECKI, Estate, and JULIANNA KAMECKI, Plaintiffs,	)	
v.	)	Civil Action No. 3017-85 Civil I—Judge Wolf
NICOLA A. SMILEVSKY, M.D., P.C., Defendant.	)	

PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Plaintiff Julianna Kamecki replies, on behalf of herself and the estate of Maria Kamecki, to defendant's motion for Summary Judgment as follows:

1. On April 27, 1987 plaintiff submitted her rule 26(b)(4) statement designating Maureen N. Minor as an expert witness.

2. Dr. Minor, who preceded defendant as decedent's treating physician, spoke on more than one occasion with plaintiff's attorney and designated a personal legal representative with whom plaintiff's attorney discussed her role as a witness, both specific and expert, for purposes of establishing the standard of care and treatment followed in this case.

3. Dr. Minor is a qualified 26(b)(4) witness who will testify in this case.

4. Summary judgment is not appropriate because there are genuine issues of fact which, if decided in plaintiff's behalf,

will establish a relevant standard of care which defendant deviated from prior to the death of Mrs. Kamecki.

Dated: August 24, 1987

/s/

James S. Turner -082479

/s/

Betsy E. Lehrfeld -379359
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Attorneys for Plaintiffs

APPENDIX F

THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA CIVIL DIVISION

MARIA KAMECKI, Estate, and JULIANNA KAMECKI, Plaintiffs,	)	
v.	)	Civil Action No. 3017-85 Civil I—Judge Wolf
NICOLA-A. SMILEVSKY, M.D., P.C., Defendant.	)	

PLAINTIFF'S RULE 12-I (k) STATEMENT OF MATERIAL FACTS IN DISPUTE

1. The standard of care which gives rise to plaintiff's complaint is not limited to, and may not turn on, issues of a complicated medical nature but includes, and may rest on, the simple question of what reasonable precaution would a physician be expected to take when assuming care of a patient from another physician.

2. Dr. Minor, who preceded Dr. Smilevsky as the physician treating the deceased, was contacted by plaintiff's attorney on several occasions, and designated a personal legal representative who spoke with plaintiff's attorney about her appearing as a witness with knowledge, both expert and specific, that would demonstrate the proper standard of care in this case.

3. Dr. Minor is a qualified 26(b)(4) expert for purposes of this case.

Respectfully submitted,

/s/

James S. Turner -082479

/s/

Betsy E. Lehrfeld -379359
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APPENDIX G

COMPLAINT FOR DAMAGES ARISING FROM MEDICAL MALPRACTICE (EXCERPTS)

1. Jurisdiction in the Superior Court is based upon Title II, Section 921 of the District of Columbia's Code (1973 ed.).

2. Plaintiffs—1, Maria Kamecki, deceased, was resident of the District of Columbia. Plaintiff 2, Julianna Kamecki, Maria Kamecki's daughter, is a resident of the District of Columbia.

Plaintiff 1, Maria Kamecki, deceased, will be referred to as Plaintiff 1, mother, or Maria Kamecki, or Plaintiff.

Plaintiff 2 will speak in first person or as plaintiff or as plaintiff 2.

3. Defendant is a physician licensed by the District of Columbia and specializing in the practice of general medicine and critical care. The defendant is Director, Intensive Care Associates of Capitol Hill Hospital. The defendant maintains his principal offices at 201 8th Street, N.E., Washington, D.C. 20002.

* * *

25. (b) On July 5, 1983, plaintiff took her mother, Maria Kamecki, by ambulance, to the Capital Hill Hospital, where she remained until July 16, 1983, in Room 3234. She shared the room with a big, fat black woman, Geraldine Ellis, born June 28, 1917, who was Dr. Smilevsky's patient. Mrs. Ellis then proceeded to tell me that she too has been a stroke victim, but that Dr. Smilevsky took her immediately to the hospital, and today she had no ill effects left from that stroke.

(c) Dr. Smilevsky never suggested taking mother to the hospital after her first stroke under his care, or bothered to take her to the hospital after the second stroke under his care.

* * *

27. On February 22, 1982, the plaintiff sought defendant's professional services for the care of her mother, Mrs. Maria Kamecki, stressing particularly stroke prevention. The plaintiff sought the services of another physician a few days earlier, but the physician, although he had agreed to come, did not show up. The plaintiff was deeply apprehensive about her mother's health.

In rendering her treatment to plaintiff Maria Kamecki, defendant Smilevsky and any medical personnel under defendant's supervision owed plaintiff Maria Kamecki a duty of care to render treatment in accordance with accepted standards of care provided by members of the medical profession. Approximately two weeks after the defendant's first visit on February 22, 1982, Mrs. Maria Kamecki suffered a severe stroke. The defendant, although immediately advised of that, arrived on March 3, 1982, decided that Mrs. Kamecki did not suffer a stroke, and took no other action other than to continue treatment as before. Mrs. Kamecki suffered another stroke approximately another two weeks later. The defendant arrived on March 22, 1982, decided that she had no stroke, and took no action other than to prescribe a new drug, coumadine. The defendant also witnessed Mrs. Kamecki's "X" on the new bank signature card, as the plaintiff's mother was no longer able to understand a simple business transaction. The two strokes left the mother paralyzed and with a destroyed mind. On April 2, 1982, the plaintiff took over the mother's bank account as joint owner as the mother was no longer able to sign checks.

* * *

28. Defendant caused plaintiff, Maria Kamecki, only after one visit, to become paralyzed and to have her mind destroyed. Defendant took no action to take her to the hospital, and did not give her any new medication, but left her unprotected for another stroke to occur, which did occur two weeks later. Again, defend- ant did not take any action to take Maria Kamecki ~~to the~~ hospital for treatment, despite incredible advances in microscope optics and precision microinstruments which now enable neurosurgeons to restore life-giving circulation to the brains of stroke victims and to the hearts of heart attack victims. Defendant did not give Maria Kamecki any stroke prevention medication except coumadine, and this he gave her after the second stroke under his medical care.

APPENDIX H

District of Columbia Superior Court Rule 56

Rule 56. Summary Judgment.

(a) For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this Rule judgment is not rendered upon the whole case

or for all the relief asked and a trial is necessary, the Court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in the Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the Court may refuse the application for

judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the Court at any time that any of the affidavits presented pursuant to this Rule are presented in bad faith or solely for the purpose of delay, the Court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him/her to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX I

District of Columbia
Superior Court Rule 26(b)(4)

Trial preparations: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the Court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this Rule, concerning fees and expenses as the Court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the Court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this Rule; and

(ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this Rule the Court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this Rule the Court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

APPENDIX J

Citations to Leading Summary Judgment Cases

This table lists the total number of cases cited in 5 *Shepard's United States Citations—Cases* (5th ed. 1984, supp. 1986-1988 (Part 2) & supp. July 1989 (Part 1A)) for two recent Supreme Court cases which ruled upon summary judgment— *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 — and the total number of cases cited for the two prior major cases, decided 16 and 18 years earlier, regarding summary judgment—*Adickes v.S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, (1970) and *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct 1575.[1]

Case	*Decided*	*Citations*	*Yrly Avg.*
Celotex	June, 1986	2,327	775
Liberty Lobby	June, 1986	2,109	703
Adickes	June, 1970	1,637	86
Cities Service	May, 1968	803	38

[1]Cited by the Court in *Celotex* and *Liberty Lobby*.

APPENDIX K

Representative Cases Demonstrating Conflicts Regarding Summary Judgment

This table lists cases[1] representative of the conflicts and inconsistencies among lower courts in interpretation of the standards of summary judgment since *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The table lists whether or not summary judgment was granted below (Yes or No) and if it was upheld (Y) or overturned (N). The 'Split' column gives the vote among the court, and then indicates the concern(s) raised by the court.

Dissent — a mark indicates a dissent which disagreed as to the majority's interpretation of the standards posed by *Celotex* and *Liberty Lobby;*

Threshold — a mark indicates the court discussed whether or not this line of cases changed the threshold of summary judgment to that of a less drastic remedy;

Timing — a mark indicates the court discussed the meaning of adequate time for discovery; and,

---

[1]These cases are principally selected from the cases (32 listed for *Celotex* and 42 listed for *Liberty Lobby*) in *Shepard's United States Citations—Cases*, (6th Ed. & Supp. July 1989 (Part 1A)) as either cited in dissent, or cited as harmonizing, explaining or distinguishing the cases. The cases listed in this table are not listed in the Table of Authorities unless they are otherwise referred to in this Petition.

Proof — indicates the court discussed whether the *Celotex* and *Liberty Lobby* line of cases have altered the role of the judge in weighing the parties' evidence.

CT./ CITE	S.J.? Upheld?	Split	Court discusses changes in standards after Celotex and Liberty Lobby			
			Dissent	Threshold	Timing	Evidentiary
CIR. D.C.						
803 F.2d 1213	Y N	2/1	X	X		
CIRCUIT 1						
864 F.2d 933	Y Y	3/0		X		X
856 F.2d 384	Y N	3/0		X		
CIRCUIT 2						
821 F.2d 913	N P	2/1	X			X
821 F.2d 111	Y P	2/1	X			X
799 F.2d 867	Y Y	2/1				X
CIRCUIT 3						
860 F.2d 1227	Y N	2/1	X			X
860 F.2d 1209	Y Y	2/1			X	X
855 F.2d 136	Y Y	2/1	X			X
823 F.2d 49	Y N	2/1	X		X	
813 F.2d 610	Y N	3/0		X	X	X
807 F.2d 1169	Y N	2/1	X	X		
76 Bankr. Rep. 444	N	—			X	

121 F.R.D. 52	Y	—		X	X	
CIRCUIT						
877 F.2d 409	N Y	2/1				X
823 F.2d 129	Y Y	2/1	X		X	
803 F.2d 857	Y Y	3/0			X	
CIRCUIT 6						
696 F.Supp. 275	N	—		X		
CIRCUIT 7						
867 F.2d 395	Y Y	2/1	X		X	
670 F.Supp. 787	N	—			X	
CIRCUIT 8						
698 F.Supp. 183	N	—		X	X	X
CIRCUIT 9						
840 F.2d 1409	Y Y	2/1	X			X
669 F.Supp. 998	Y	—		X		
CIRCUIT 10						
843 F.2d 414	N Y	3/0			X	
CIRCUIT 11						
855 F.2d 723	N	2/1	X			X
848 F.2d 1534	Y Y	2/1	X			X

[5] Affirmed in part, reversed in part.

No. 89-345

(2)

In The

Supreme Court of the United States

October Term, 1989

JULIANNA KAMECKI, Individually and as Personal Representative of the Estate of MARIA KAMECKI, Deceased,

Petitioner,

v.

NICOLA A. SMILEVSKY, M.D., P.C.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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No. 89-345

In The

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October Term, 1989

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Petitioner,

v.

NICOLA A. SMILEVSKY, M.D., P.C.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Respondent Nicola A. Smilevsky, M.D. respectfully asks that the Petition for a Writ of Certiorari sought by petitioner to review the judgment of the District of Columbia Court of Appeals entered on May 31, 1989 be denied.

COUNTERSTATEMENT OF THE CASE

In this action Petitioner, Julianna Kamecki, proceeding both individually and on behalf of the estate of her

deceased mother, Maria Kamecki, seeks damages for wrongful death allegedly caused by the neglect of Respondent, Nicola Smilevsky, M.D., who was her mother's treating physician for a brief period prior to her death at the age of 84.[1] Originally proceeding *pro se*, Petitioner commenced the action by filing a pleading styled "Complaint For Damages From Medical Malpractice" on April 27, 1985. In that Complaint, which was approximately twenty-seven (27) pages in length, Petitioner apparently alleged that her mother's death was caused by the unspecified medical negligence of Dr. Smilevsky.[2] Subsequent discovery and other pre-trial proceedings eventually revealed that Ms. Kamecki was alleging that her mother's death was caused by the negligent withdrawal of the mother's anti-stroke medication, a drug known as Persantine. (App. G, 14a-16a).

After certain preliminary motions by Respondent were addressed and ruled upon, Respondent filed his Answer to the Complaint on or about June 28, 1985, and shortly thereafter propounded certain written discovery requests to the Petitioner. For almost a year thereafter, Petitioner, who was still acting *pro se*, ignored the pending discovery requests and did nothing to prosecute her

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[1] Respondent submits the following additions and clarifications necessary to correct the Statement Of The Case proffered by Petitioner. References herein to the Appendices to the Petition for Writ of Certiorari are cited "App." References to the Supplemental Appendix to this Brief In Opposition To Petition for Writ of Certiorari are cited "Supp. App."

[2] Who was the sole defendant in the Superior Court.

case. Finally, in response to efforts by Respondent to compel responses to the pending discovery, Petitioner retained counsel who entered his appearance on or about June 18, 1986. In due course, at the request of Respondent, the case was assigned to the Civil I Branch of the Civil Division of the Superior Court[3] where it was assigned to the calendar then supervised by Associate Judge Peter Wolf.

Thereafter, in accordance with his custom and as allowed by the court rules, Judge Wolf held a Status Conference on January 9, 1987, and following that conference entered a Scheduling Order pursuant to which Petitioner was required to file a "Rule 26(b)(4) Statement[4]" setting forth the identity, qualification of and opinions of all of her expert witnesses on or before April 6, 1987. On April 3, 1987, Petitioner requested and received an extension of the deadline for filing her 26(b)(4) statement upon her representation that her search for an expert had been fruitless. By Order dated April 8, 1987, Judge Wolf directed Petitioner to submit her Rule 26(b)(4) Statement by April 27, 1987. (Supp. App. A, 1a.) On April 27, 1987, Petitioner filed the required statement designating one Maureen N. Minor, M.D., as her sole expert and indicating that Dr. Minor, another of her mother's physicians,

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[3] *See*, Superior Court Civil Rule 40-II for an explanation of the Civil I Branch and its function.

[4] The reference is to Superior Court Civil Rule 26(b)(4) which is identical to Fed. R. Civ. Proc. 26(b)(4). (*See* App. I, 20a - 21a).

would testify as to certain matters which did not seem to deal with the medical issues in the action. (App. D, 8a-9a).

In due course the deposition of Petitioner's expert was noted and taken by counsel for Respondent. Although he had been notified of and agreed to the deposition date, Petitioner's counsel failed either to attend or request a postponement of Dr. Minor's deposition which, accordingly, proceeded as scheduled on June 30, 1987.

At her deposition, Dr. Minor stated that she had not been requested to serve as an expert witness either by Petitioner or by Petitioner's attorney. She also testified, unequivocally, that she had not agreed to serve as an expert witness in the lawsuit and that, in any event, she simply had no opinions regarding whether Respondent had violated the standard of care in connection with his treatment of Petitioner's mother.

Thereafter Respondent timely filed a Motion For Summary Judgment alleging that expert testimony was required to prove the essential medical elements of Petitioner's case and that without such an expert there was no reason for a trial inasmuch as Petitioner could not prove either a breach of the relevant standard of care by the Respondent or that such a breach, if any, had proximately caused her mother's demise. *See*, Respondent's Statement of Material Facts Not in Dispute, (Supp. App. B, 2a-3a).

Petitioner failed to respond to Respondent's Motion For Summary Judgment within the allotted time and, on August 24, 1987, Judge Wolf granted the unopposed

Motion and entered judgment in Respondent's favor. (App. B, 4a-5a).

Petitioner duly requested reconsideration of the ruling and, after oral argument on Petitioner's Motion For Reconsideration, Judge Wolf reaffirmed his prior entry of Summary Judgment in Respondent's behalf and dismissed the case. (App. C, 6a-7a). At oral argument upon Petitioner's Motion For Reconsideration Judge Wolf found, contrary to Petitioner's position, that the complexity of the case required Petitioner to establish the essential elements of negligence through expert medical testimony, which she lacked, and that there was therefore no basis for allowing her to proceed to trial.[5]

Petitioner then appealed the ruling to the District Of Columbia Court Of Appeals. On appeal Petitioner alleged that Summary Judgment was inappropriate because the testimony of Dr. Minor provided a sufficient basis for a jury to find negligence on the part of Respondent and that summary judgment was premature, inasmuch as Petitioner had not yet completed her own discovery.[6] The Court Of Appeals affirmed by an unsigned *per curiam*

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[5] Petitioner's position was apparently that (1) no expert testimony was required and (2) that summary judgment was inappropriate, in any event, because Petitioner had not yet completed her own discovery by deposing Dr. Smilevsky. Judge Wolf apparently found the latter argument unconvincing for several reasons, not the least of which being that Petitioner *had never requested a deposition of Dr. Smilevsky.*

[6] *See,* Footnote 5. It should also be pointed out that, although Petitioner's counsel had entered an appearance over fourteen (14) months prior to Judge Wolf's final ruling, Petitioner never propounded any discovery requests to Respondent.

opinion, holding that expert testimony was required and that summary judgment was appropriate in the absence of any such testimony.

At no time while the case was pending in either the Superior Court Of The District Of Columbia or the District Of Columbia Court Of Appeals has Petitioner ever raised any constitutional question or other federal issue warranting review by this Court.

REASONS FOR DISMISSING OR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because there was no federal question raised in the courts below and there is no constitutional or federal question raised in the petition itself.

The Petition should also be denied because the Superior Court of the District of Columbia did not commit error in granting Respondent's Motion for Summary Judgment. Substantial and adequate District of Columbia case law supports the District of Columbia Court of Appeal's affirmance of the trial court's action.

II. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO CONSIDER THIS CASE.

The Supreme Court derives its authority to review final judgments of the highest state courts by Writ Of

Certiorari pursuant to 28 U.S.C. Section 1257.[7] Under 28 U.S.C. Section 1257, generally, jurisdiction is present only if the validity of a statute or treaty of the United States is in question or if the validity of a state statute is in question on the grounds that it is repugnant to the Constitution or laws of the United States. Additionally, the jurisdiction of the Court may be invoked pursuant to 28 U.S.C. Section 1257 "when any title, right, privilege or immunity is especially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under, the United States."

The Supreme Court will review a final decree of the highest state court when there is a substantial federal question involved. *See, e.g., Henry v. Mississippi*, 379 U.S. 443 (1965); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). *See also, Reich v. Freeport*, 388 F. Supp. 953 (1974); *Pelliccioni v. Schuyler Packing Co.*, 356 A. 2d 4 (N.J. 1976). The Supreme Court of the United States will not reexamine the final judgments of a state court unless the federal issues were presented to the state court in the first instance and the state court was timely apprised of the nature or substance of those federal claims. *Illinois v. Gates*, 462 U.S. 213 (1983); *Webb v. Webb*, 451 U.S. 493 (1981).

In this case, the trial court, relying upon the local case law of the District Of Columbia, ruled that expert

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[7] In this case, Petitioner claims that this Court has jurisdiction under 28 U.S.C. Sections 1254 and 1257. Section 1254 deals with jurisdiction of this Court over other federal courts. In this case, jurisdiction may not be invoked under Section 1254.

testimony was unquestionably necessary to prove a violation of the standard of care and causation. *Ebil v. Kogen*, 494 A.2d 640 (D.C. 1985). In view of Petitioner's unwillingness or inability to name an expert willing or able to testify as to those matters within the time allotted by the trial court's Scheduling Order, and as provided by Superior Court Civil Rule 26(b)(4), Judge Wolf appropriately granted summary judgment pursuant to Superior Court Civil Rule 56.[8] The inability or unwillingness of Petitioner to name an appropriate expert was clearly the basis of the rulings in the trial court and was unquestionably the sole basis by which the Court Of Appeals affirmed. Accordingly, there is and was simply no federal question involved in this case. Petitioner does not attack the validity of any statute, state or federal, and Petitioner has never claimed a right under the Constitution or any law of the United States.

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[8] At oral argument in the trial court on Petitioner's Motion for Reconsideration of Order Granting Defendant's Motion for Summary Judgment, Judge Wolf mentioned that the holding in *Ebil v. Kogen* was consistent with two Supreme Court cases: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Petitioner may not invoke jurisdiction of this Court merely because the trial court chose to refer to federal cases for interpretation. *See, Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61 (D.C. 1980)(the District of Columbia Court of Appeals is not bound in its interpretation of the Superior Court rules by a federal court's interpretation of the same federal rule).

III. ADEQUATE AND INDEPENDENT STATE GROUNDS SUPPORT THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS

The Supreme Court of the United States will not review a decision of a state court which rests upon adequate and independent non-federal grounds. *Bell v. Maryland*, 378 U.S. 226, 237 (1963). If adequate and independent state grounds exist, the Supreme Court will not take jurisdiction even if there is a federal issue. *Bacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

In her Petition Petitioner argues, for the first time, that this case presents a unique opportunity for the Supreme Court to clarify standards for a state court's treatment of summary judgment motions. Petitioner argues that it was error for Judge Wolf to grant summary judgment in this case because Petitioner had not had an adequate opportunity for discovery. The real issue is whether the trial court abused its discretion in granting summary judgment when, after fourteen (14) months, the Petitioner had not instituted any attempts to obtain discovery from defendant; had not obeyed the trial court's Scheduling Order with regard to the designation of the required experts; and, at least initially, had not even bothered to respond to the Motion For Summary Judgment when it was filed.

Indeed, the very words of the Petitioner's own so-called "Complaint For Damages From Medical Malpractice," as well as her responses to Respondent's extensive discovery requests; and, finally, her own Rule 26(b)(4)

Statement, are highly significant in illuminating the burden of proof that she had to meet. This discovery clearly indicated that Petitioner's claims involved treatment that required knowledge solely within the competence of the medical profession. Therefore, summary judgment was properly granted in this medical malpractice action where Petitioner could not or would not produce a medically qualified expert when the testimony of such an expert was required by the complexity of the case.

In the District of Columbia, the plaintiff must bear the burden of introducing proof sufficient to establish a *prima facie* case of medical malpractice. Such a *prima facie* case

> . . . must normally consist of evidence which establishes the applicable standard of care, demonstrates that this standard has been violated, and develops a causal relationship between the violation and the harm complained of.

Ebil v. Kogan, supra, 494 A.2d at 640; *See also Morrison v. MacNamara,* 407 A.2d 555 (D.C. 1979). The standard of care has generally been defined as that degree of skill or care a reasonably prudent person would have exercised under the same or similar circumstances. "Beyond this, the law requires that those engaging in activities requiring unique knowledge and ability to give a performance commensurate with the undertaking." *Washington Hospital Center v. Butler,* 384 F.2d 331, 335 (D.C. Cir. 1967). A defendant's specific conduct is then evaluated against the appropriate standard to determine if his conduct is reasonable under the circumstances. For lay jurors,

unlearned and inexperienced in the area of medical science and the accompanying array of sophisticated terms and concepts,

> . . . there must, when the special tests are applied, be an explanation in order that they may intelligently determine what the criterion is and whether the defendant's conduct meets it.

Id., 384 F.2d at 335.

Summary judgment is especially appropriate here for it is a mechanism to promptly dispose of actions in which there is no genuine issue of material fact and, in doing so, avoids the time, expense and burden of a useless trial.

By disposing of actions in which there is no genuine issue of material fact, summary judgment

> . . . avoids the needless expenditure, both by the courts and by the parties of valuable resources in unnecessary trials, and mitigates the potential for misuse of the legal process by a party to harass adverse parties or to coerce them into settlement.

Nader v. de Toledano, 408 A.2d 31, 42-43 (D.C. 1979); *cert. denied*, 444 U.S. 1078 (1980).

Petitioner is mistaken in her reliance upon *Abbey v. Jackson*, 483 A.2d 330 (D.C. 1985), to support her theory that Judge Wolf erred when he ruled that expert testimony was needed in this medical malpractice action. In making such an assertion Petitioner has failed to analyze the two-part character of *Abbey v. Jackson* appropriately. The facts of *Abbey v. Jackson*, an informed consent case, involve a plaintiff who alleged that she did not receive information necessary to make an informed decision as to whether or not to undergo an abortion. *Abbey v. Jackson*

did not deal with the nature of the risks involved but rather was confined to the single issue of whether plaintiff was *informed* of those risks:

> To meet the expert testimony requirement . . . Abbey must establish through expert testimony, the presence and types of risks associated with abortions. The parties in this case however, do not dispute the existence and nature of risks in an abortion; whereas Abbey alleges she received no information. Thus the cogent question in this case is one of credibility, traditionally the province of the jury, and the need for and role of expert testimony extremely limited.

Abbey v. Jackson, supra, 483 A.2d at 334.

The crucial difference between *Abbey v. Jackson* and this case is that in *Abbey v. Jackson* the complex medical issues, " . . . the presence and type of risks associated with abortions . . . " were not dispositive of the case. Rather, *Abbey v. Jackson* turned on the credibility of defendants and plaintiff, not whether plaintiff was informed of those risks.

In this case, Petitioner argued that the alleged medication change somehow "caused" her mother's stroke. The dispute here centered on the cause of strokes and their prevention. The issue of credibility in *Abbey v. Jackson* was within the traditional province of the jury, but the medical issue, the cause and prevention of strokes, is not within the ken of the average juror. It is precisely for this reason that Petitioner is required to present testimony by a medical expert.

Petitioner's inability to withstand summary judgment was *not* due to lack of sufficient time to gather

information to oppose summary judgment, as contemplated by Rule 56(f). Counsel thought that he had an expert and never asked for time to gather affidavits or to engage in additional discovery. The problem with Petitioner's argument of lack of time is that Petitioner cannot demonstrate that she was not accorded ample time either to conduct her discovery *or* to respond to the Defendant's Motion For Summary Judgment. She requested, and was granted an extension of time to file her Rule 26(b)(4) Statement. Petitioner had exactly two years from the date suit was filed within which to produce expert testimony. The need for the extension may have come about because of difficulty or inability to locate an expert willing to testify against Dr. Smilevsky. But whatever the cause, by naming Dr. Maureen Minor as an expert, Petitioner demonstrated that she was ready to proceed. As it turned out, Petitioner's desire to proceed amounted only to a vague hope that Dr. Minor's testimony would be favorable to her at some point, without any reasonable inquiries as to whether Dr. Minor would testify and if so, what the subject matter of her testimony would be.

Petitioner refused to accept the fact that once having charged Defendant with negligence, the burden of proof was on her to come forward with expert testimony on the appropriate standard of care and show any breach thereof. However, without expert testimony, Petitioner failed to show she could provide a jury a knowledgeable explanation of the unfamiliar medical terms and concepts involved in a discussion of transient ischemic attack (TIA) and stroke, its cause and prevention, and the claimed benefits of dipyridamole (Persantine), all of

which was necessary for the jury to determine intelligently what the relevant standard of care was, and whether or not respondent's actions fell below that standard. *Washington Hospital Center v. Butler*, 384 F.2d 331, 335 (D.C. Cir. 1967). Defendant's conduct is not actionable unless his performance falls below the appropriate standard of care.

When a Rule 56(e) motion for summary judgment is made and supported an adverse party

> . . . may not rest upon the mere allegations in his pleadings, . . . his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not [so] respond, summary judgment if appropriate, shall be entered against him.

Stevens v. Airline Pilots Assn., 413 A.2d 1305, 1308-09 (D.C. 1980), *cert. denied*, 449 U.S. 1111 (1981). If the movant, in this case Dr. Smilevsky, makes a *prima facie* showing of his entitlement to summary judgment, that motion must be granted " . . . unless the opposing party offers competent evidence admissable at trial showing that there is a material issue of fact in dispute." *Nader v. de Toledano, supra*, 408 A.2d at 43. Simple reiteration that Plaintiff's counsel "expects" his expert to testify is simply not enough to postpone summary judgment.

Summary judgment cannot be further delayed because of a "vague hope" or "mere speculation" that other evidence may turn up to substantiate the bare allegations of the pleadings. *See, e.g., E.P. Hinkel & Co. v. Manhattan Co.*, 506 F.2d 201, 205 (D.C. Cir. 1974). Failing the submission by the opposing party of "specific" and "concrete" facts revealing the existence of a genuine issue

at trial, summary judgment must be granted. *Stevens v. Barnard*, 512 F.2d 876, 878 (10th Cir. 1975); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F. Supp. 263, 266-267 (1976).

CONCLUSION

The Petition For A Writ Of Certiorari should be denied because there is no federal question raised therein.

The Petition should also be denied because the action of the District Of Columbia Court Of Appeals affirming the judgment of the Superior Court Of The District Of Columbia was entirely proper. The Superior Court committed no error in granting Respondent's Motion For Summary Judgment. Substantial District of Columbia case law supports the proposition that the granting of a motion for summary judgment in this case was proper under the law of the District of Columbia.

Finally, Respondent has been forced to defend this totally non-meritorious claim for over four (4) years while Plaintiff has failed or refused to produce expert testimony establishing any breach of duty. Dr. Smilevsky should no longer be forced to bear the outrageous burden of defending Petitioner's unfounded attempts to keep this matter alive.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX A

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

MARIA KAMECKI, Estate,)
and)
JULIANNA KAMECKI,)
Plaintiff)
v.)
NICOLA A. SMILEVSKY, M.D.,)
Defendant.)

ORDER

UPON DUE CONSIDERATION of the Motion for Enlargement of Time filed herein on behalf of plaintiff Julianna Kamecki, and of the Memorandum of Points and Authorities filed in support thereof, and of the [lack of] Opposition thereto, it is, by the Court, this 8th day of April, 1987,

ORDERED, that said Motion be, and the same hereby is, GRANTED, and that the time for submission of plaintiff's Rule 26(b)(4) motion be, and the same hereby is, extended to April, 1987.

Peter H. Wolf
Judge

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SUPPLEMENTAL APPENDIX B

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

Civil Division

MARIA KAMECKI, Estate,)
and)
JULIANNA KAMECKI,)
Plaintiff)
v.)
NICOLA A. SMILEVSKY, M.D.,)
Defendant.)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. The standard of care which gives rise to the plaintiff's Complaint involves issues of a complicated medical nature. The ability to present evidence concerning this standard of care is within the exclusive competency of the medical profession. (Complaint, paragraphs 25, 27 and 28; plaintiff's Answers To Interrogatories Nos., 13, 14, 15, 19, 21 and 34).

2. The only medical expert designated by the plaintiff was Maureen N. Minor, M.D. Dr. Minor stated that she had not been contacted by the plaintiff or her attorney, that she had not agreed to serve as an expert witness in this lawsuit and that she had no opinion on the standard of care involved. (Plaintiff's 26(b)(4) statement filed April 27, 1987; Deposition of Maureen N. Minor, M.D. pp 6-7, the record herein).

3. The deadline for plaintiff to submit a 26(b)(4) expert expired April 27, 1987. (Order of Judge Wolf dated April 8, 1987, the record herein).

Respectfully submitted,

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/s/ _____

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